

members was referred to another division of the Industrial Court by the Minister on 14 August 1987. That division had not determined and made an award in respect of that dispute on 27 February 1988, when the question of locus standi of the union was heard by the Industrial Court. In holding that the union had no locus standi because it no longer had any members, the Industrial Court was in fact adjudicating the dispute of wrongful dismissal of the teachers who were union members, and had come to the conclusion that the teachers' services had been lawfully terminated. This Industrial Court had no jurisdiction to determine that dispute, because that very dispute had not been referred to it by the Minister, but to another division of the Industrial Court to adjudicate. Further, the finding by the court that the union had no members was wholly unsupported by evidence. The court had therefore reached that finding by assuming erroneously that because no union member was present before it on 27 February 1988, the union had no member to represent.

It was argued before me that the Industrial Court had to make its award without delay under s 30(3) of the Industrial Relations Act which states:

30(3) The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under s 20(3).

The dispute over the collective agreement was referred to the Industrial Court by the Minister on 12 January 1987 and the award on locus standi of the union was made on 27 February 1988. As it is, there had been already some delay. But under the circumstances, since the Industrial Court had knowledge that the dispute over the wrongful dismissal and the reinstatement of teachers was being inquired into by another division of the Industrial Court, the court should have stayed further proceedings on the question of locus standi of the union until further determination of the dispute over the reinstatement.

I allow the appeal with costs, quash the award and make the further order that another division of the Industrial Court shall hear this dispute.

*Appeal allowed.*

Solicitors: *Lobo & Associates; Shook Lin & Bok.*

Reported by *Ng Sheau Jiuan*

## A Malaysian Industrial Development Finance Bhd v Eureka Ferro-Alloy Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT  
NO C4-23-3254-86  
SITI NORMA YAAKOB J  
4 JANUARY 1989

B *Companies and Corporations – Debenture secured by plaintiff bank – Assets sold by receivers appointed under debenture – Allegation that receivers breached duty to obtain best market price by excluding stocks in trade from sale and failing to levy rentals from successful tenderer who kept machinery purchased in defendant's factory – Whether there exist merits in allegation*

C The plaintiff had granted a loan to the first defendant which was secured by (a) two guarantees of the third defendant and (b) a principal and supplemental debenture giving the plaintiff a first fixed charge on the assets of the first defendant and empowering the plaintiff to appoint receivers and managers upon default by the first defendant. Two receivers and managers were appointed on 3 January 1983 and they sold the first defendant's assets but the proceeds of sale were insufficient to settle the amount due to the plaintiff. The plaintiff subsequently obtained a judgment in default of appearance against the third defendant in respect of the balance due on the loan. The third defendant applied to set aside the judgment in default of appearance and the plaintiff appealed against the senior assistant registrar's order to the High Court.

E In disputing liability, the third defendant alleged that the receivers had breached their duty to obtain the best market price for the charged assets by (i) failing to account for stocks that were not sold and excluding various items from the sale by tender; (ii) failing to levy rentals on the successful tenderer who was allowed to keep the machinery they purchased in the first defendant's factory. As a result, the first defendant suffered loss of rentals. In reply to the first allegation, the plaintiff averred that under the principal debenture dated 4 May 1983, the assets that were charged were only those specifically listed in the Third Schedule which consisted of foundry equipment, and that as stocks in trade and other assets did not form part of the Third Schedule, the receivers were not authorized to sell them. As to the second allegation, the plaintiff stated that the premises do not belong to the first defendant and as such, the right to let out or the loss of rentals does not arise at all.

G **Held**, dismissing the plaintiff's appeal:

(1) The plaintiff's first reply cannot be right as there was a supplemental debenture executed on 13 January 1984 wherein under s 2.02, the Third Schedule to the principal debenture was deleted and replaced by another Third Schedule attached to the supplemental debenture for which the items charged were no longer restricted to foundry equipment alone but extended to all other chattels which the first defendant may thereafter acquire. The word 'chattel' is wide enough to include all stocks-in-trade and the fact that the receivers had not taken the stocks-in-trade into consideration when selling the other machinery would therefore lend support to the third defendant's allegation that the receivers had failed to take into consideration the interests of the third defendant when effecting the sale.

I (2) The plaintiff's reply to the third defendant's claim of loss of rentals cannot be right also as the plaintiff had been informed as early as 2 October 1985 that the first defendant had entered into a sale and purchase agreement for the factory

building with the registered owners and this agreement establishes the first defendant's right to occupy the premises including the right to claim rentals and the collection of such rentals would greatly reduce the amount payable to the plaintiff. In any event, the right to rentals does not arise only on proof of ownership as a tenant is equally entitled to rentals if he sublets the demised premises to other third parties provided no restrictions have been placed on such subletting.

*K Mogan* for the plaintiff/appellant.

*SS Muker* for the third defendant/respondent.

*Cur Adv Vult*

**Siti Norma Yaakob J:** On 26 November 1986, judgment in default of appearance was entered against the third defendant as the guarantor under two guarantees, a principal and a supplemental guarantee dated 4 May 1983 and 13 January 1984 respectively. As the managing director of the first defendant, he had personally guaranteed repayment of a loan due from the first defendant to the plaintiff.

On 6 July 1988, the senior assistant registrar allowed the third defendant's application to set aside the judgment in default of appearance and the proceeding before me was an appeal by the plaintiff against the senior assistant registrar's order which started firstly by way of a chamber hearing followed subsequently by further arguments in open court at the request of the plaintiff.

Apart from the guarantees, the loan to the first defendant was also secured by a debenture dated 4 May 1983 and a supplemental debenture dated 13 January 1984 which gave the plaintiff a first fixed charge on the assets of the first defendant and which also empowered the plaintiff upon default by the first defendant to appoint receivers and managers to take possession of the first defendant's assets and to sell them.

Two receivers and managers were appointed on 3 January 1985 and they sold the first defendant's assets, but the proceeds of sale were insufficient to settle the amount due to the plaintiff and the present claim is in respect of the balance due on the loan granted by the plaintiff to the first defendant.

In disputing liability, the third defendant has alleged that the balance sum claimed against him does not reflect the true value of the first defendant's assets as the receivers had breached their duty to obtain the best market price for the charged assets and in support of this allegation raised the following two issues.

The receivers had failed to account for stocks that were not sold and had excluded various items totalling \$113,762.49 from the sale by tender.

The reply given by the plaintiff to this allegation is that under s 4.01 of the debenture dated 4 May 1983, the assets of the first defendant that were charged were only those specifically listed in the Third Schedule which on

A the whole consisted of foundry equipment and it was these machinery that the receivers were authorized to take possession and to sell. As stocks-in-trade and other assets did not form part of the Third Schedule, the plaintiff contends that the receivers were therefore not at liberty to sell them as well.

B I consider that this reply cannot be right as there was a supplemental debenture executed on 13 January 1984, wherein under s 2.02, the Third Schedule to the principal debenture was deleted and replaced by another Third Schedule attached to the supplemental debenture for which the items charged were no longer restricted to foundry equipment alone but extended to all other chattels which the first defendant may thereafter acquire. The word 'chattel' is wide enough to include all stocks-in-trade and the fact that the receivers had not taken the stocks-in-trade into consideration when selling the other machinery would therefore lend support to the third defendant's allegation that the receivers had failed to take into consideration the interests of the third defendant when effecting the sale.

E The receivers had allowed the successful tenderer to keep the machinery they purchased in the first defendant's factory without levying any form of rentals from the tenderer.

The third defendant maintains that the loss suffered by the first defendant is the loss of rentals which he estimates at \$7,500 per month.

F To this, the plaintiff has averred that the premises do not belong to the first defendant and as such the right to let out or the loss of rentals do not arise at all.

G Here again the plaintiff cannot be right as they had been informed as early as 2 October 1985 that the first defendant had entered into a sale and purchase agreement for the factory building with M/s Peninsular Sawit, the registered owners, and this agreement establishes the first defendant's right to occupy the premises including the right to claim rentals, and the collection of such rentals would greatly reduce the amount payable to the plaintiff. In any event the right to rentals does not arise only on proof of ownership, as a tenant is equally entitled to rentals if he sublets the demised premises to other third parties provided no restrictions have been placed on such subletting.

I From the affidavits I was satisfied that there are merits disclosed by the third defendant, which if established, would necessarily reduce his liability to meet repayment of the loan granted to the first defendant. I do not consider it sufficient for the plaintiff to state that the third defendant's cause of action should be against the receivers personally since the third defendant has alleged that the receivers had breached their duty to sell for which the plaintiff had not in any way interfered.

This I consider is a question of fact as the main complaint of the third defendant is that the receivers had failed to consider his interests when exercising the power of sale. Under such circumstances, whether the plaintiff can be held responsible for such an omission by the receivers can only be determined by oral evidence and for this very reason, I had affirmed the decision I had made earlier in chambers which was to dismiss the plaintiff's appeal with costs.

*Appeal dismissed.*

Solicitors: *Hisham, Sobri & Kadir; Lovelace & Hastings.*

Reported by *Ng Sheau Jiuan*

### Edward Goh Geok Seng v Dunstan Dumpangol & Ors

HIGH COURT (KOTA KINABALU) – CIVIL SUIT NO K346 OF  
1988  
MOHAMAD NOOR J  
8 NOVEMBER 1988

*Civil Procedure – Order to strike out plaintiff's statement of claim – Application for – Issues to be decided in plaintiff's action were being adjudicated in two other pending suits – Whether application to strike out can succeed on this sole ground – Other factors to be looked at*

In his statement of claim, the plaintiff sought certain declarations against the defendants in relation to the defendants' appointments as directors of a company in respect of which the plaintiff is also a director, and to the purported allotment of shares. Soon after filing the claims, the plaintiff applied for several orders under O 29 r 1 of the Rules of the High Court 1980, on a certificate of urgency, to restrain some of the defendants from doing certain acts in relation to the management of the company. Subsequently, the defendants filed an application for an order that the plaintiff's action be stayed and/or struck out under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 on the ground that the plaintiff's action was an abuse of the process of court. The gist of the defendants' contention was that the questions or issues that were to be decided in the present action were being adjudicated in two other suits pending before the High Court at Kota Kinabalu, viz Suit 1419 of 1987 ('Suit 1419') and Suit 162 of 1988 ('Suit 162'). In Suit 1419, the plaintiff was the claimant whilst in Suit 162, the plaintiff was the defendant.

**Held**, dismissing the defendants' application:

(1) The court is satisfied that the prayers asked for and the issues raised in the plaintiff's statement of claim are substantially the same as those in Suit 1419 and Suit 162. However, this alone will not entitle the defendants to succeed.

(2) Other factors will have to be considered as well. Firstly, the suits are all pending before the same High Court though due to administrative arrangements they are to be heard before different judges. Secondly, none of the prayers and issues

raised in the suits have been determined on their merits. Thirdly, the suits are capable of being consolidated. The suits can be consolidated to the extent that Suit 162 be ordered to stand as a counterclaim.

(3) In the final analysis, there is no improper purpose on the part of the plaintiff in filing the present action.

(4) Costs are awarded against the defendants because their application is really unnecessary. The defendants knew very well that the plaintiff's application under O 29 r 1, which was under a certificate of urgency, ought to be disposed of as soon as possible in order to preserve the status quo and yet they filed their application and insisted that it be heard first. This has not only occasioned unnecessary costs but also unnecessary delay in the proceedings.

[*Editorial Note:* The plaintiff's application under O 29 r 1 of the Rules of the High Court 1980 is reported in [1989] 2 MLJ 121. The defendants have appealed to the Supreme Court vide Civil Appeal No 561 of 1988.]

*Yapp Hau Pehn* for the plaintiff.  
*KY Sim* for the defendants.

*Cur Adv Vult*

**Mohamad Noor J:** This is an application by the defendants for an order that the plaintiff's action be stayed and/or struck out under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 on the ground that the plaintiff's action was an abuse of the process of the court. The plaintiff in his statement of claim sought, inter alia, the following orders:

- (a) a declaration that the first and second defendants had ceased to be directors of the ninth defendant on certain specified dates;
- (b) a declaration that the purported appointment of the sixth, seventh and eighth defendants as directors of the ninth defendant with effect from a certain specified date is null and void;
- (c) a declaration that the purported allotment of certain specified number of shares to the first, second, third and fourth defendants on a certain specified date is null and void;
- (d) for the first, second and sixth defendants to return a certain specified sum of money to the ninth defendant with interest thereon.

Soon after filing the said claims, the plaintiff by summons-in-chambers under O 29 r 1 applied for several orders, inter alia, to restrain some of the defendants from doing certain acts in relation to the management of the ninth defendant, its assets and property, and their purported shareholdings in the ninth defendant. The plaintiff filed a certificate of urgency for the purpose.

The case was argued in open court. I ordered the defendants' application to be argued first:

- (a) the gist of the defendants' contention is that the questions or issues that are to be decided in the